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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
Amendment of Part 90 of the Commission's)
Rules to Provide for the Use of the)
220-222 MHz Band by the Private Land)
Mobile Radio Service)

PR Docket No. 89-522

)
Implementation of Sections 3(n) and 332)
of the Communications Act)

GN Docket No. 93-252

)
Regulatory Treatment of Mobile Services)

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COMMENTS UPON FOURTH NOTICE OF PROPOSED RULEMAKING

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September 13, 1995

No. of Copies rec'd 014
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Summary

On August 29, 1995, the Commission released its Fourth Notice of Proposed Rulemaking in the 220-222 MHz proceeding ("4th NPRM"). In the 4th NPRM, the Commission proposes rules that would (a) limit the protected service area of incumbent ("Phase 1") 220 MHz licensees to their 38 dBu contour and (b) allow for the processing of only those modification applications that result in no extension beyond a licensee's 38 dBu contour as measured from its licensed transmit site. The Commission's proposal to limit the protected area of licensees to their 38 dBu contour is based on faulty assumptions about propagation that were made in 1991 without the benefit of field tests or "real world" operation. Its restrictive modification scheme ignores the fact that three years passed between issuance of licenses and regulatory and judicial finality that enabled licensees to construct.

Incom Communication Corporation ("Incomco") is one of the largest, if not the largest, 220 MHz management company in the United States. Incomco's clients are serving thousands of subscribers from dozens of transmit sites. Reliable signals can be received at distances greater than 40 miles from almost every Incomco-managed transmit site. Based on this "real world" performance, Incomco submits that the protected area for 220 MHz Phase 1 licensees should be their 32 dBu contour, similar to the protected area afforded to cellular licensees.

Many of the Incomco-managed systems were constructed and are being operated pursuant to STAs as a result of the Commission-

imposed freeze on 220 MHz applications which has been in effect since mid-1992. Operations pursuant to these STAs result in contours that extend beyond the licensees' licensed 38 dBu contours. Despite the modified service area, these STAs were liberally granted by the Commission in an effort to bring this new service to the public. If the Commission's modification rules are adopted, many licensees operating systems serving paying customers will have to "deconstruct" their systems and then "reconstruct" at reduced and possibly directionalized power; a result that is clearly at odds with the public interest.

Incomco proposes allowing licensees to file modification applications proposing site changes less than 30 kilometers provided the existing 120 kilometer co-channel spacing requirement is satisfied. Applicants would be able to request a waiver of the 120 kilometer requirement only if all affected parties simultaneously filed applications with letters from each affected party consenting to the short space.

Adopting Incomco's proposals will achieve the Commission's stated goal of preventing mutually exclusive modification applications or mutual exclusivity between Phase 1 modification applications and Phase 2 initial applications. Its proposals will also enable Phase 1 licensees to continue to provide service to their paying subscribers without decreasing the licensee's reliable service area and without service interruption.

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COMMENTS UPON FOURTH NOTICE OF PROPOSED RULEMAKING

Incom Communications Corporation ("Incomco"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, respectfully submits its Comments in response to the Fourth Notice of Proposed Rulemaking ("4th NPRM") released by the Commission on August 29, 1995 in the above-referenced dockets. As discussed in Part I below, Incomco is currently one of the largest, if not the largest, 220 MHz system management company in the United States. Therefore, Incomco has a substantial interest in the outcome of this proceeding. Incomco generally supports the position which it understands that AMTA is presenting in this proceeding.¹ However, Incomco is filing these Comments to amplify and supplement AMTA's filing herein.

I. **Background.**

In 1991, the Commission released its first Report and Order in PR Docket No. 89-522, 6 FCC Rcd 2356 (1991) (the "R&O"), which

¹ Incomco is a member of AMTA's 220 MHz council.

adopted rules governing the permitted uses, technical parameters and application process for the 220-222 MHz band. The Commission allocated the 200-222 MHz band for private land mobile radio ("PLMR") service because the 800 and 900 MHz allocations for PLMR service had been exhausted and demand for new spectrum continued to exceed supply. 6 FCC Rcd at 2357.

Based on the technical parameters the Commission adopted, Incomco's principals estimated that 220 MHz licensees operating their transmitters at the maximum allowable power and at the maximum permissible antenna height would be able to provide reliably receivable signals up to sixty miles from the licensee's transmitter location, and would virtually always have reliable service 40-miles from the transmitter. Incomco believed that 220 MHz operators would be able to offer superior dispatch service, because a 40-mile coverage area is greater than the coverage provided by 800 or 900 MHz SMR operators. See Declaration of Ron Domres, Vice President of Incomco, attached as Exhibit A ("Domres Declaration"), p.1.

Incomco planned, constructed and now manages 220 MHz systems in such major markets as Chicago, Houston, Dallas, San Francisco and Los Angeles, as well as smaller markets. Based upon its estimated 40-mile radius service contours, Incomco has invested millions of dollars in this infant industry. In each of the markets where Incomco manages 220 MHz systems, reliable signals are receivable often at distances of 50 to 60 miles, and almost never less than 40 miles from a licensee's transmitter site. Domres

Declaration at p.2. At several of its sites, Incomco is operating systems pursuant to STAs which were granted by the Commission. None of those STAs propose to change the authorized city of license, or to allow licensees to serve significantly different geographic areas than they are licensed to serve.

In the original R&O, the Commission did not define a *per se* service area for 220 MHz non-nationwide licensees. It did provide for 120 kilometers (72 miles) co-channel protection for 220 MHz licensees (see Section 90.723(f)) and adopted maximum operating parameters of 500 watts ERP at 150 meters. (See Section 90.729.) 6 FCC Rcd at 2371. Thus, even assuming that a co-channel system was licensed 120.1 kilometers away, current Section 90.723(f) provides *de facto* protection to a 36-mile radius service contour. Incomco reasonably relied upon this protection when it spent the millions of dollars that it has spent developing incumbent ("Phase 1") licenses.

Incomco's experience in actually operating 220 MHz systems in the "real world" has confirmed all of its expectations. Specifically, all of the 220 MHz systems Incomco manages provide reliable signal reception at distances of at least 40 miles from licensee's transmitter sites over 90% of the time.

II. There Is No Rational Basis for a 38 dBu Standard.

In the 4th NPRM, the Commission proposes a rule change that would be devastating to Incomco and its clients, as well as to all other 220 MHz Phase 1 licensees that have constructed their systems and their respective management companies. Without any basis in

fact or actual "real world" tests, the FCC concluded that 220 MHz licensees should have protected areas of only about 28 miles radius (i.e., to their 38 dBu contour). The FCC's proposed 38 dBu protected service contour is inappropriate and without any rational basis. First, it is unsupported by any field tests. Second, it is totally inconsistent with real-world propagation. Third, it is at odds with the Commission's factual findings and its rules for cellular in the 800 MHz and 900 MHz band, where the Commission changed from a 39 dBu standard to a more rational 32 dBu standard.

In the Commission's Cellular Service Further Notice of Proposed Rulemaking, 6 FCC Rcd 6158 (1991), the Commission conceded that its prior 39 dBu standard for 800 MHz cellular service was not supported by "real world" facts:

After careful consideration of the arguments advanced by the commenting parties, we have been persuaded that we should not make the CGSAs coterminous with the composite outer boundary of the predicted 39 dBu contours as proposed. It is clear that many of the commenting parties, including some with years of field experience with cellular system coverage, believe that reliable cellular service is regularly provided beyond the point where the median field strength drops below 39 dBu.

6 FCC Rcd at 6158. The Commission sought further comment ² and eventually adopted a 32 dBu standard. Cellular Service Second Report and Order, 7 FCC Rcd 2449, 2452-2453 (1992).

The cellular service is authorized in the 800 MHz band. Patently, if one expects 32 dBu from a UHF-band technology such as cellular, one must expect at least as good propagation from a VHF-band technology such as 220 MHz.

² 6 FCC Rcd at 6159.

The Commission attempts to justify its proposed 38 dBu standard by reference to certain statements that were contained in the original 220 MHz R&O. See 6 FCC Rcd at 2370-2371. However, those references were not based upon field tests but upon rough guesses by Commission staff personnel. Moreover, those rough guesses were made at a time when the Commission was still presuming a 39 dBu contour would equate to a reliable service area contour for cellular. Obviously, if the Commission staff was guessing that 220 MHz would yield reliable service at a median field strength of 38 dBu at the same time that it was assuming that cellular could yield reliable service only at a median field strength of 39 dBu, the Commission conceded even then that VHF-band 220 MHz systems would provide reliable service at a lower median field strength than would UHF-band cellular. Accordingly, if cellular provides reliable service along a 32 dBu contour, 220 MHz must be providing reliable service along a contour of 32 dBu or lower.

Section 6002(d)(3)(B) of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") obligates the Commission to make rules so that Part 90 CMRS licensees "are subjected to technical requirements that apply to licensees of substantially similar common carrier services." Although 220 MHz is not always substantially similar to cellular there is no basis for discriminating in favor of cellular licensees with respect to propagation and protected service area issues. The Commission would be blatantly violating the Budget Act if it affords 220 MHz

licensees any lesser protected service area than is afforded to cellular.³

III. The Commission Should Utilize a More Realistic Standard.

Incomco would propose a protected contour of either 32 dBu or, at the very least, 60 kilometers (36 miles), which would represent one-half of the existing required co-channel separation distance for 220 MHz licensees. These proposals are more in line with the actual performance of 220 MHz systems currently managed by Incomco. Given that co-channel licensees' transmit sites were licensed at least 120 kilometers apart consistent with Section 90.723(f) of the Rules, adopting a 60 kilometer protected area would not create any short space situations among incumbent Phase 1 licensees.

IV. A More Permissive Modification Procedure Should Be Implemented.

The Commission's proposed rules would not allow the consideration of any modification application, not even those based on Commission-granted STAs, that would result in the extension of a licensee's 38 dBu contour as measured from the licensee's originally licensed parameters. Field testing and "real world" use has demonstrated that the signals of 220 MHz licensees can be reliably received by mobiles at distances of over 40 miles, so the 38 dBu contour is an unrealistic limitation to begin with. The Commission's adoption of such a restrictive modification rule, especially now that licensees have been authorized to construct

³ Also, virtually all 220 MHz licenses and management companies are small businesses and intended beneficiaries of the Paperwork Reduction Act of 1980. The proposed rule violates this statute as well.

systems pursuant to STAs that result in extensions of the licensee's originally authorized contours, would only compound the problem.

Incomco manages several facilities which are operating pursuant to STAs that extend beyond the licensee's originally licensed contour. Under the Commission's proposal, these STAs would be cancelled, licensees would likely have to deconstruct and reconstruct at their original sites or tremendously reduce and directionalize power in order to stay within their supposed original contours.

The Commission's stated motivation in suggesting this rigid approach to modification applications is to avoid the possibility of mutually exclusive modification applications, or modification applications that would be mutually exclusive with Phase 2 initial applications. 4th NPRM at ¶ 9. That goal can be met with a less restrictive amendment rule.⁴

Incomco proposes that the Commission permit Phase 1 220 MHz licensees to modify their licenses by relocating their transmit sites up to 30 kilometers from their authorized site, provided that at the proposed modification site, the licensee maintains the required 120 kilometer co-channel spacing distance. Requests for

⁴ The Commission's belief that many STAs and the subsequent applications to seek license modifications to specify the STA parameters will result in Phase 1 licensees serving "significantly different geographic areas" is not borne out by Incomco's experience. None of the STAs its clients filed propose such changes. For this as well as the other reasons set forth herein, the Commission's proposal violates the Paperwork Reduction Act of 1980.

waiver of the 120 kilometer co-channel spacing requirement would be entertained only upon the simultaneous filing of modification applications by all affected parties, with a letter of consent to the short space from each affected applicant. Any modification application proposing to move a transmitter site more than 30 kilometers would be summarily dismissed, as would any application that does not maintain the 120 kilometer co-channel spacing, unless all licensees simultaneously file for a waiver of the rule and accompany the filing with consent letters from all affected parties. This proposal will allow for continued uninterrupted service to present 220 MHz customers and increase the number of facilities operating pursuant to STAs that can successfully modify their licenses to their STA parameters.⁵

V. **Equitable Considerations Warrant More Flexibility for Incumbent Licensees**

The long and tortured history of these Phase 1 220 MHz pioneer licensees warrants consideration and adoption of Incomco's proposal. The FCC first accepted applications for the 220 MHz band on May 1, 1991. The Commission disposed of petitions for reconsideration of the R&O in a Memorandum Opinion and Order released on July 16, 1992.⁶ On July 30, 1992, certain aspects of the procedures for the filing and acceptance of 220 MHz

⁵ Regardless of the license modification scheme eventually adopted by the Commission, Incomco respectfully requests clarification, by way of a definitive ruling, regarding the use of directional antennas in modification applications.

⁶ 220 MHz Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992).

applications was appealed to the U.S. Court of Appeals for the District of Columbia Circuit.⁷ The Commission issued licenses to lottery winners who, under normal conditions, would have had eight months to construct their stations. However, because of the pending litigation, the Commission allowed the lottery winners a 120 day construction period measured from the date of the final disposition of the appellate court case.⁸

On March 18, 1994, the appellate court case was dismissed, and on March 30, 1994, the Commission released an Order extending the construction deadline for all non-nationwide 220 MHz authorizations issued prior to the March 30, 1994 release date to December 2, 1994.⁹ With regulatory and judicial finality, the 220 MHz Phase 1 licensees took to constructing their stations.

One of the immediate problems for licensees was sites that were available in 1991 were no longer available in mid-1994. Licensees were unable to apply for modifications of their authorizations to viable sites because the Commission had imposed a freeze on the acceptance of such applications.¹⁰

The Commission's solution was to accept and grant requests for STAs from licensees that proposed contours outside of the

⁷ See Evans v. Federal Communications Commission, Case No. 92-1317.

⁸ See Public Notice, Lottery for 220-222 MHz Private Land Mobile "Local" Channels, DA-1231, released September 14, 1992.

⁹ Order, PR Docket No.89-522 DA 94-276, released March 30, 1994.

¹⁰ Order, DA 91-647, released May 24, 1991.

licensees' originally licensed contours. The STAs allowed 220 MHz licensees to commence service to the public, and many licensees jumped at the opportunity to construct, presuming license modifications to their STA parameters would be available.

Thousands of subscribers are being served from the dozens of transmit sites Incomco has been managing for several months. These operating 220 MHz systems are providing reliably receivable signals to mobile units at distances of at least 40 miles, and often between 50 and 60 miles, albeit in areas not within the licensees' originally authorized 39 dBu contour. Four years after grant of applications were filed, and three years after grant of licenses, 220 MHz service is finally available. Any rules the Commission adopts should at the very least allow 220 MHz licensees that have constructed to continue to provide service to the area they now have authorization, whether by license or STA, to serve.

VI. Conclusion.

The Commission's proposal to limit an incumbent Phase 1 licensees protected contour to 28 miles and prevent license modifications will cause tremendous financial consequences to Incomco and the other 200 MHz pioneers who have fought long and hard to commence operations in this band. It will also affect service to thousands of customers presently served by 220 MHz service providers. Expanding incumbent licensee's contours to 60 kilometers and adopting Incomco's license modification proposal maintains the required 120 kilometer co-channel spacing, is more in

accord with "real world" performance experienced by Incomco and will allow reliable uninterrupted 220 MHz service to continue.

Respectfully submitted,

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DECLARATION

I, Ron Domres, do hereby declare under penalty of perjury as follows:

I am Vice President of Incom Communications Corporation ("Incomco"), which is one of the largest, if not the largest, 220 MHz system management company in the United States. Incomco's principals have over a half century of experience in private land mobile communications. I have read and am familiar with the Federal Communications Commission's August 29, 1995 Fourth Notice of Proposed Rulemaking in PR Docket No. 89-522. I have also read the Comments to which this Declaration is attached. All facts set forth therein are true and correct. However, I would like to amplify and emphasize some of those facts.

When the 220 MHz allocation was made available to private radio service providers by the Commission, Incomco anticipated, based on its engineering projections, that a 220 MHz license using maximum power and height would provide a 40 mile reliable service area. Incomco understood that the Commission was allocating the 220 - 222 MHz band to private land mobile radio because allocations in the 800 MHz and 900 MHz bands had been exhausted. Demand for private radio frequency was exceeding the available supply. It was on that basis that Incomco became involved in the 220 MHz industry during its infancy.


In the years following the lottery of the Phase 1 220 MHz licenses, Incomco planned, organized and built its infrastructure

and has begun contracting with customers for dispatch service. Our company based all of its projections on the fact that 220 MHz customers would be provided a 40 mile radius coverage area for each licensed transmit site, which allowed Incomco to offer clients a competitive edge over the coverage offered by 800 MHz SMR service. Now that we have had many months of real world use by paying customers, we have found that the performance of 220 MHz service not only met, but often exceeded our coverage area projections.

Incomco has spent millions of dollars to plan, construct and manage systems in markets that include Chicago, Houston, Dallas, San Francisco and Los Angeles, and is committed to spending millions more. Incomco is serving large numbers of subscribers from dozens of base stations. In all of the markets where Incomco is managing 220 MHz dispatch systems, the "real world" reliable coverage area is often between 50 and 60 miles from the transmit site, but never less than 40 miles. Thus, the Commission's proposal to limit a licensee's protected area to 38 dBu or approximately 28 miles lacks factual basis and is totally unacceptable.

In addition, I have reviewed the over two dozen STAs that have been granted to Incomco-managed 220 MHz license holders, and not a single STA resulted in a move from the licensee's originally allocated market.

Executed this 13th day of September, 1995.


Ron Domres